In the United States

Circuit Court of Appeals

For the Ninth Circuit

February Term, 1916.

No. 2719.

The Santa Cruz Development Co. et al.,
Appellants,

vs.

Cornelius C. Watts et als.,
Appellees.

Brief on Behalf of the Bouldin Appellees

JOSEPH W. BAILEY,
JOHN H. CAMPBELL,
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A STATEMENT OF THE CASE.

This suit was begun on June 23rd, 1914, in the District Court of the United States for the District of Arizona, by a bill in equity to quiet title to a tract of land containing 99,289.39 acres, located in Santa Cruz County, Arizona, and known as Baca Float No. 3. The land was granted to the heirs of Luis Maria Baca by the United States by an Act of Congress, approved June 21, 1860. The plaintiffs claim title under a deed from John S. Watts, grantee of the heirs of Baca,

to Christopher E. Hawley, dated January 8th, 1870, and by mesne conveyances from Hawley. The deed from John S. Watts to Christopher E. Hawley dated January 8th, 1870, will hereinafter be referred to as the Hawley deed.

On May 30, 1871, the heirs of Baca executed a further deed to John S. Watts, and the plaintiffs claim that the title which passed to John S. Watts by this deed inured to the benefit of Christopher E. Hawley. This deed will be hereinafter referred to as the "confirmatory" deed.

The questions of the operation and effect of these two deeds are the first questions for the consideration of the court, and if this court agrees with the trial court, that decision will render immaterial all other questions in this case, except the single question of the claim of Joseph E. Wise and Margaret W. Wise to an undivided one-thirty-eighth interest, each, under deeds from certain alleged heirs of Baca.

Hawley conveyed his interest to John C. Robinson. In 1892, John C. Robinson conveyed the north half of the land to James E. and P. W. Bouldin. The Bouldin defendants in this case are the successors in interest of James E. and P. W. Bouldin. In 1893 John C. Robinson conveyed the south half of the land to Alex. F. Mathews, of West Virginia, and the plaintiffs in this case are the successors in interest of Alex. F. Mathews.

The Santa Cruz Development Company contends that the Hawley deed did not convey the title to the land

in controversy, and that they have the entire title to the land through conveyances from the heirs of John S. Watts, dated in the autumn of 1899 and in 1913.

The defendant, Joseph E. Wise, claims an undivided one-thirty-eighth interest under deeds from certain alleged heirs of Luis Maria Baca, dated in 1913. He further claims approximately a two-thirds interest in the land under deeds from the widow of John Ireland and from Wilbur H. King. This last claim of title is based upon the theory that the Hawley deed did not convey the title to the land in controversy, and that an undivided two-thirds interest therein passed to David W. Bouldin (father and grandfather of these defendants) by a deed dated September 30th, 1884, from the heirs of John S. Watts. Joseph E. Wise claims one-ninth of that two-thirds interest under a conveyance from David W. Bouldin to John Ireland and Wilbur H. King in 1885, and by mesne conveyance from them to him. He claims the remainder of that two-thirds interest under a deed dated in 1899, from the Sheriff of Pima County to Wilbur H. King, made under a judgment of the District Court of Pima County in certain judicial proceedings by King and Ireland against David W. Bouldin.

Margaret W. Wise claims an undivided one-thirty-eighth interest under the same deeds from certain alleged heirs of Baca upon which Joseph E. Wise bases his claim to an undivided one-thirty-eighth interest.

In addition to their claim to the north half of the land under the deed from John C. Robinson to P. W. and

James E. Bouldin, these defendants have a claim to an undivided two-thirds interest under another chain of title, namely, the deed dated September 30th, 1884, from the heirs of John S. Watts to David W. Bouldin. They make claim under this deed in the event and only in the event, that this court shall decide that the Hawley deed did not convey the title to the land in controversy. In that event, the title to the land in controversy was in the heirs of John S. Watts on September 30th, 1884, and these defendants claim an undivided two-thirds interest under a deed from those heirs dated on that day. They claim that the deed from David W. Bouldin to John Ireland and Wilbur H. King in 1885 conveyed no title, for certain reasons discussed further on, and that the deed made by the Sheriff of Pima County to Wilbur H. King, as a result of certain judicial proceedings by Ireland and King against David W. Bouldin, was also invalid for reasons discussed further on.

At the trial of the case at bar in the District Court at Tucson in March, 1915, the court decided that the Hawley deed conveyed the property in controversy, and that the title which passed to Watts by the confirmatory deed of 1871 inured to the benefit of Watt's previous grantee, Hawley. The court further decided that the deeds of 1864 and 1871 from the Baca heirs to Watts only carried eighteenth-ninetenths of the entire title to the land in controversy, and that one-nineteenth belongs to Joseph E. Wise and Margaret W. Wise through conveyances in 1913 from certain persons who claimed to

be heirs of an Antonio Baca, alleged to have been a son and heir of Luis Maria Baca.

The Santa Cruz Development Company appealed from the entire decree. Joseph E. Wise appealed from that portion of the decree which decided that the Hawley deed passed the title to the land in controversy and that the confirmatory deed inured to the benefit of Hawley. Margaret W. Wise did not appeal; the Bouldin defendants and the plaintiffs appealed from that portion of the decree which awarded the one-thirty-eighth interest each in the land in controversy to Joseph E. and Margaret W. Wise.

The Bouldin interest under the deed of 1884 from the heirs of John S. Watts to David W. Bouldin is somewhat greater than under the Hawley deed; but we supported the contention of the plaintiffs in the trial court, because we believed then and believe now that the Hawley deed conveyed the land in controversy.

THE FACTS.

The facts ,or such of them as affect the rights of these defendants, are as follows:

The sixth section of an Act of Congress approved June 21st, 1860 (12 Stat. 71) provided

> "And be it further enacted, That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the same tract of land as is claimed by the town of Las Vegas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them, in square bodies, not exceeding five in number. And it shall be the duty of the surveyor-general of New Mexico, to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them; Provided, however, That the right hereby granted to said heirs or Baca shall continue in force during three years from the passage of this Act, and no longer."

On June 17, 1863, John S. Watts, as attorney for the heirs of Luis Maria Baca, selected the land here in controversy as the third of the five tracts of land which were selected by the heirs of Luis Maria Baca under the above Act of Congress.

On April 9, 1864, the Commissioner of the General Land Office approved that selection and ordered a survey thereof, the plat and field notes of which survey were to be returned to the General Land Office at Wash-

ington and filed therein as muniments of the title of the heirs of Baca. This survey was never made for various reasons, and no survey of the tract was made by the United States until the Contzen survey.

On June 22, 1914, the Supreme Court of the United States in the case of Lane v. Watts, 234 U. S. 525 (rehearing denied with opinion 235 U. S. 17) decided that title to the land selected by John S. Watts, as attorney for the heirs of Luis Maria Baca, on June 17, 1863, and in controversy in this case, passed out of the United States and into the heirs of Baca by the approval of the Commissioner and order for survey on April 9, 1864; that thereafter the Land Department ceased to have jurisdiction over the land, except for the purpose of surveying the outboundaries thereof in order to segregate the same from the public lands of the United States; enjoined the Secretary and Commissioner from treating it as public land and ordered them to place on file the field notes and plot of survey made by Philip Contzen for the purpose of defining the outboundaries of said land and segregating the same from the public lands of the United States. The field notes and plat of the Contzen survey were filed in the Office of the Commissioner of the General Land Office on or about December 14, 1914, in pursuance to the mandate of the Supreme Court of the United States.

On May 1, 1864, the heirs of Luis Maria Baca executed a deed (Rec., p. 154) to John S. Watts conveying the lands here in controversy, which deed was acknowledged May 2, 5, and 14, 1864, and duly recorded.

On May 1, 1864, the heirs of Luis Maria Baca also executed a further deed (Rec., p. 165) to John S. Watts conveying the land in controversy, which deed was acknowledged on that day and duly recorded.

On April 30, 1866, John S. Watts addressed the following letter (Rec., p. 176) to the Commissioner of the General Land Office:

Washington City, April 30, 1866.

"Hon. J. M. Edmunds,

Commissioner of Land Office,

Sir:

You will find, by reference to the papers on file in your office, that on the 17th of June, 1863, I filed with the surveyor-general of New Mexico an application for the location of one of the five locations confirmed to the heirs of Luis Maria Cabeza de Baca under the tenth section of the act of Congress approved June 21, 1860. I further state that the existence of war in that part of the Territory of Arizona and the hostility of the Indians prevented a personal examination of the locality prior to the location, and not having a clear idea as to the direction of the different points of the compass, when the subsequent examination of the location was made by Mr. Wrightson, in order to have the location surveyed, it was found that the mistake made would result in leaving out most of the land de-

signed or intended to be included in said location. Mr. Wrightson was killed by the Indians and no survey has been made because of said mistake in this initial point of location. Under these circumstances I beg leave to ask that the surveyor-general of New Mexico be authorized to change the initial point so as to commence at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, running thence from said beginning point north 12 miles 36 chains and 44 links, thence east 12 miles 36 chains and 44 links, thence south 12 miles 36 chains and 44 links, thence west 12 miles 36 chains and 44 links to the place of beginning. I beg leave further to state that this land which will be embraced in this change of the initial point is of the same character of unsurveyed vacant public land as that which would have been set apart by the location as first solicited, but is not the land intended to have been covered by said location, but the land to be included within the boundaries above designated is the land that was intended to be located and was believed to have been located upon until preparations were made to survey said location. Under this state of the case it is hoped that directions will be given to the surveyor-general to correct the mistake.

Yours, respectfully,

JOHN S. WATTS,

Attorney for Heirs of Luis Maria Cabeza de Baca."

On May 21, 1866, the Commissioner of the General Land Office replied (Rec., p. 177) to that letter as follows:

Department of the Interior—General Land Office.

Washington, D. C., May 21, 1866.

"John A. Clark, Esq.,

Surveyor-General, Santa Fe, N. Mex.

Sir:

On the 9th of April, 1864, instruction was issued by this office to Levi Bashford, surveyor-general of Arizona, for the survey of one of the five locations confirmed to the heirs of Don Luis Maria Baca under the Sixth Section of the Act of Congress approved June 21, 1860.

The starting point of this location of the claim was to be a point 1 1-2 miles from the base of the Salero Mountain, in a direction north 45 degrees east of the highest point of said mountain.

The original instructions as aforesaid have been this day returned to this office by John S. Watts, attorney for heirs of Luis Maria Cabeza de Baca, dated April 30, 1866, together with a diagram of the intended location, but erroneously described by him in his application of the 17th June, 1863, addressed to you as the surveyor-general of New Mexico. The papers thus returned are herewith transmitted to you with directions that you cause

the survey to be executed in accordance with the amended description of the beginning point which is described in Mr. Watts' application of the 30th April last, provided by so doing the outboundaries of the grant thus surveyed will embrace vacant lands not mineral.

I am, very respectfully,

J. M. EDMUNDS,
Commissioner."

No survey of the attempted amended location of 1866 was ever made by the United States for various reasons not material to this case.

From 1866 until July 25, 1899, the metes and bounds described in the letter of April 30, 1866, from John S. Watts to the Commissioner of the General Land Office were treated by the claimants and by the Land Office as the proper description by metes and bounds of the Baca Float No. 3.

On July 25, 1899, the Department of the Interior remitted the claimants to the original location of 1863, holding that the attempted amendment in 1866 was in reality a new location, and that the department was without power to permit such a new location after the expiration of the three years limited by the Act of June 21, 1860.

On January 8, 1870, John S. Watts executed a deed (Rec., p. 193) conveying the Baca Float No. 3 to Christopher E. Hawley. The description of the land in this

deed will be set out in full further on. Whatever title to the land now in controversy passed to Christopher E. Hawley by the deed dated January 8, 1870, from John S. Watts had become vested previous to 1892 in John C. Robinson, of Binghamton, New York.

On May 30, 1871, certain persons claiming to be all of the heirs of Luis Maria Baca executed a deed (Rec., p. 197) to John S. Watts, acknowledged on the same date and duly recorded, by which the said heirs ratified and confirmed the title made by them and by their attorney, Tomas Cabeza de Baca, to John S. Watts, his heirs and assigns, on the 1st day of May, 1864, for the land now in controversy, and relinquished and quit-claimed to said John S. Watts, his heirs and assigns, all their right, title and interest in all the lands in said deed of May 1st, 1864, mentioned and described. This deed contained a covenant that the grantors were all the heirs of Luis Maria Cabeza de Baca.

John S. Watts died some time previous to September 30, 1884.

On September 30, 1884, and after the death of John S. Watts, his heirs conveyed to David W. Bouldin by a deed(Rec., p. 272) dated on that day an undivided two-thirds of the land now in controversy, describing it as Location No. 3, and by the metes and bounds of the original location of 1863. This deed was signed, sealed and delivered in the presence of B. H. Davis and David K. Osbourn, and was recorded on March 25, 1885, in Pima County, Arizona, without acknowledgement, and re-re-

corded with an acknowledgement in Pima County, Arizona, on April 18, 1888, in Volume 14, Real Estate and Mortgages, page 597. The above deed was executed by John Watts for himself and as attorney in fact for the other heirs of John S. Watts.

On February 25, 1885, by deed (Rec., p. 312) acknowledged on that date and duly recorded, David W. Bouldin conveyed to John Ireland and Wilbur H. King an undivided one-third of one-third of all right, title and interest owned and controlled and possessed by the said David W. Bouldin in Location No. 3 of the Baca Series, describing it by the metes and bounds of the original location of 1863.

On November 19, 1892, John C. Robinson conveyed to Powhatan W. Bouldin and James E. Bouldin by deed (Rec., p. 400) acknowledged on the same day and duly recorded, the north half of Baca Location No. 3, describing it as the northern half of the tract known as Location No. 3 of the Baca Series and by the metes and bounds of the north half of the attempted amended location of 1866.

Whatever interest passed from John C. Robinson to James E. and P. W. Bouldin by this deed described above is now vested one-half in the defendant, Jennie N. Bouldin, and one-half in the infant defendants, David W. Bouldin and Helen Lee Bouldin, the children of James E. Bouldin by his first wife, Daisy Belle Bouldin, of Austin, Texas.

On March 13, 1893, Messrs. John Ireland and Wilbur H. King instituted suit (Rec., p. 456) against David W. Bouldin in the District Court of Pima County, Arizona, to recover the sum of $5,000, and accrued interest, due by promissory note executed by the said David W. Bouldin and payable to the order of the said Ireland and King; and on March 14, 1893, an attachment (Rec., p. 464) was levied on the interest of David W. Bouldin in the lands here in controversy.

In December, 1893, David W. Bouldin died, and thereafter Leo Goldschmidt was duly appointed administrator of the estate of David W. Bouldin, and substituted as defendant in the case.

On the 2d day of May, 1895, the court rendered a judgment (Rec. p. 468) against Leo Goldschmidt as administrator of the estate of David W. Bouldin, for the sum of $8550.00, with interest and costs, and ordered that "said amount be paid by the said Leo Goldschmidt, administrator, in the due course of the administration of the estate of David W. Bouldin, deceased," and further ordered a foreclosure of the "attachment lien as the same existed on the 14th day of March, 1893."

Under the foregoing judgment, and on the 8th day of July, 1895, R. N. Leatherwood, Sheriff of Pima County, Arizona, gave notice that he would, on the 31st day of July, 1895, sell at public auction all the right, title, claim and interest of Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased, in and to the property in controversy, and all the right, title and interest

which David W. Bouldin had at the time of his death therein. (Rec., p. 474.)

On July 31st, 1895, the Sheriff sold to Wilbur H. King for $2,000, and on January 16th, 1899, the then sheriff of Pima County conveyed (Rec., p. 515) to Wilbur H. King, "all the right, title, interest and claim which the said judgment debtor, Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased, had on the 31st day of July, 1895, or at any time afterwards or now have" in and to the property in controversy.

On April 24th, 1907, Wilbur H. King conveyed to Joseph E. Wise all of his interest in the lands now in controversy by a quitclaim deed (Rec., p. 320) acknowledged on April p4th, 1907, duly recorded.

On April 8th, 1907, Mrs. A. M. Ireland, widow of John Ireland, conveyed to Joseph E. Wise all of her interest in the lands now in controversy by a quitclaim deed (Rec., p. 323) duly acknowledged and recorded.

During the year 1913, certain persons who claimed to be the descendants of an Antonio Baca, alleged to have been a son and heir of Luis Maria Baca, conveyed to Joseph E. Wise and Jesse H. Wise by quitclaim deeds, duly acknowledged and recorded, all their interest in the land in controversy. One-half of the one-nineteenth interest claimed to have been conveyed to Joseph E. Wise and Jesse H. Wise by these deeds is now vested in Margaret W. Wise.

On the 29th day of September 1914, the Superior

Court of the State of Arizona, in and for the County of Pima, issued an order (Rec., p. 524) directing John Nelson, Sheriff of Pima County, to execute, acknowledge and deliver to Joseph E. Wise a deed, as such sheriff, conveying to the said Wise "all of the property and all of the right, title and interest in and to the property so sold at the aforesaid sale by the said R. N. Leatherwood, as sheriff, under said judgment and decree of the said District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima." This order recited the deed from Lyman Wakefield as Sheriff of Pima County, to W. H. King on January 16, 1899, and recited that "by inadvertence or mistake the said deed only purported to convey the right, title and interest which the said Leo Goldschmidt, administrator of the estate of said David W. Bouldin, deceased, had at the date of sale and did not recite that the same conveyed the interest which had been attached, as aforesaid, and foreclosed as aforesaid under the said judgment of the said court, aforesaid."

On October 3, 1914, John Nelson, Sheriff of Pima County, Arizona, in accordance with the above order, executed and delivered to Joseph E. Wise, as the grantee and successor in interest of Wilbur H. King, a deed (Rec., p. 520) purporting to convey all of the right, title and interest of the said David W. Bouldin, as the same existed on the 14th day of March, 1893, in and to the land now in controversy. This deed has since been recorded in Santa Cruz County, Arizona.

No notice of an intention to apply for such an order

of the court was ever given to any of these defendants or any of their attorneys.

We believe that the foregoing is a complete and sufficient statement of all the facts which bear upon the title of the Bouldin defendants.

POINTS.

(1) The deeds of May 1, 1864, and May 30, 1871, from the heirs of Luis Maria Baca to John S. Watts were signed by all the heirs of Luis Maria Baca and conveyed the entire title to the land in controversy.

(2) The Hawley deed was and is a valid and subsisting conveyance of the land in controversy.

(a) The deed of May 30, 1871, from the heirs of Luis Maria Baca to John S. Watts inured to the benefit of Christopher E. Hawley.

(b) If the above propositions be true, then the deed of November 19, 1892, from John C. Robinson to Powhatan W. Bouldin and James E. Bouldin was and is a valid and subsisting conveyance of the north half of the land in controversy.

(3) If the Hawley deed did not convey the title to the land in controversy, then the deed dated September 30, 1884, from the heirs of John S. Watts to David W. Bouldin was and is a valid and subsisting conveyance of the title to an undivided two-thirds interest therein.

(a) If the above proposition be true, then the title which was conveyed by that instrument to David W. Bouldin is now vested in these defendants.

(4) If the deed of May 30, 1871, from the heirs of Luis Maria Baca to John S. Watts did not inure to the benefit of Christopher E. Hawley, then the deed of September 30, 1884, from the heirs of John S. Watts to David W. Boudin was and is a valid and subsisting conveyance of an undivided two-thirds of all the interest in the land in controversy which was conveyed to John S. Watts by the heirs of Luis Maria Baca on May 30, 1871.

(5) No claim under adverse possession to any part of the land in controversy could be initiated prior to December 14, 1914.

ARGUMENT.

POINT 1.

(1) The deeds of May 1, 1864, and May 30, 1871, from the heirs of Luis Maria Baca to John S. Watts were signed by all the heirs of Luis Maria Baca and conveyed the entire title to the land in conveyance.

The trial court decided that the above mentioned deeds only carried eighteenth-nineteenths of the entire title to the land in controversey, and further decided that Joseph E. Wise and Margaret W. Wise were entitled to the other one-nineteenth under deeds dated in 1913 from certain persons who claimed to be descendants of an Antonio Baca, alleged to have been a son and heir of Luis Maria Baca. This was the only portion of the decree from which the plaintiffs and these defendants appealed. The Santa Cruz Development Company also appealed from this portion of the decree, and since the interests of all three of these parties are the same in this phase of the case, joint briefs will be submitted by the plaintiffs, these defendants and the Santa Cruz Development Company, dealing with this point. Therefore, we will not attempt any discussion of it in this brief.

(2) The Hawley deed was and is a valid and subsisting conveyance of the land in controversy.

This is the first point to be decided by the court in this case, and if the court decides it in accordance with our

contention, and further decides that the confirmatory deed inured to the benefit of Hawley, the decision will render immaterial all questions as to the 1884 deed from the heirs of John S. Watts to David W. Bouldin, and all questions as to the force and effect of the sheriff's sale under the Ireland and King judgment, leaving only the question whether the claim of Joseph E. Wise and Margaret W. Wise to an undivided one-nineteenth of the land in controversy shall be sustained.

The primary rule for the construction of a deed is that it shall be construed according to the intention of the grantor. There are certain secondary rules of construction which may be resorted to by the court for the purpose of discovering the intent of the parties to a deed where that intent is doubtful, and we will discuss briefly these secondary rules before we enter upon a discussion of the primary rule.

Probably the most important of these rules is:

(1) A deed should always be construed to take effect rather than to fail.

Under this rule it must be held that the Hawley deed passed the title to the land now in controversy, otherwise the deed must fail to take effect, except as to some six or seven thousand acres in the northeast corner of the land in controversy, included within the metes and bounds of both the 1863 location and the attempted amended location of 1866.

(2) Falsa demonstratio non nocet cum de corpore constat. Applying this maxim, let us strike out the description by metes and bounds. The granting clause of the deed will then read "all that tract of land lying in the Santa Rita Mountains containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part by deed dated on the 1st day of May, A. D. 1864 * * * The said tract of land being known as Location No. 3 of the Baca Series."

We do not think that any one can deny that this would be a plain and sufficient description of the land now in controversy.

(3) If a deed will admit of two constructions it should be construed most strongly against the grantor.

Salmon vs. Wilson, 41 Cal. 595.

Brown vs. State, 5 Colo. 496.

Field vs. Huston, 21 Me. (8 Shep.) 69.

Under this rule the land here in controversy would pass under the Hawley deed.

(4) Where a sufficiently certain reference is made in a deed to another instrument of record, reference may be had to that instrument in aid of the description contained in the deed.

Field vs. Huston, 21 Me. (8 Shep.) 69.

Ruppert vs. Penner, 35 Neb. 587, 53 N. W. 598, 17 L. R. A. 824.

In the Hawley deed John S. Watts described the land as having been conveyed to him by the heirs of Luis Maria Baca on May 1, 1864. Under the rule quoted above this is a sufficiently certain reference to permit of a reference to that deed in aid of the description in the Hawley deed. The deed of May 1, 1864, described the land by the metes and bounds of the original location of 1863, and that was the land which John S. Watts said in the Hawley deed that he was conveying.

(5) In the construction of a grant the court will take into consideration the circumstances attending the transaction,and the particular situation of the parties, the state of the country, and the thing granted at the time, in order to ascertain the intent of the parties.

Stanley vs. Green, 12 Cal. 148,

Grennan vs. McGregor, 78 Cal. 258,

Lane vs. Thompson, 43 N. H. 320.

At the time of the Hawley deed this property had never been surveyed. The relative locations of the 1863 and 1866 grant were not definitely known, and the parties to the deed supposed that the amended description of 1866 was the true description by metes and bounds of Baca Float No. 3.

All these secondary rules of construction point unerringly to the result for which we contend, and there are other canons to which we do not refer, because we do not consider them of sufficient importance to justify us in consuming the time of the court.

THE PRIMARY RULE.

We have already stated that the primary rule for the construction of deeds is that every deed must be construed according to the intention of the parties, and, applying this primary rule to the case at bar, we must hold that the above mentioned deed conveyed the land in controversy, because obviously Watts intended to sell and Hawley intended to buy the land which Watts had acquired from the heirs of Baca. Not only was that the intention of the parties, but the deed itself effectuates that intention. It is true that in so far as the deed describes the land by metes and bounds, it does not describe the land in controversy; but it is likewise true that the other descriptive portions of the deed accurately and completely describe the land in controversy, and according to a well-established rule for construing deeds, where descriptions conflict, we must reject the inaccurate, and accept the accurate description, if what would thus remain is a sufficient description. The deed purports to

> "remise, release and quit-claim unto said party of the second part (Christopher E. Hawley) and to his heirs and assigns forever, all that certain tract, piece or parcel of land, situate, lying and being in the Santa Rita Mountains in the Territory of Arizona, U. S. A., containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part by deed on the 1st day of May, A. D. 1864, bounded and described as follows: Beginning

at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence north twelve miles, thirty-six chains, and forty-four links; thence east twelve miles, thirty-six chains and forty-four links; thence south twelve miles, thirty-six chains and forty-four links; thence west twelve miles, thirty-six chains and forty-four links to the point or place of beginning. The said tract of land being known as location No. 3 of the Baca Series; together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; And also the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances; To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever."

Here we have three distinct and independent descriptions of the land intended to be conveyed. The first describes it as "situate in the Santa Rita Mountains in the Territory of Arizona, U. S. A., containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first

part by deed dated the 1st of May, A. D. 1864"; the second as "Bounded and described as follows: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence north twelve miles, thirty-six chains and forty-four links, thence east twelve miles, thirty-six chains and forty-four links, thence south twelve miles, thirty-six chains and forty-four links, thence west twelve miles, thirty-six chains and forty-four links, to the point or place of beginning"; and the third as "Location No. 3 of the Baca Series."

The first description, if standing alone, would be sufficient; the second description, if standing alone, would also be sufficient; and the third description, if standing alone, would be sufficient, because Baca Float No. 3 could be easily identified by inquiry at the general land office in Washington or at the local land office for the Territory of Arizona. The first description, however, is irreconcilable with the second description, and therefore one or the other must be rejected. The second description must be rejected under the rule which requires us to so construe a deed as to give it effect. To reject the first and leave the second description, would mean that Hawley took nothing under the deed from Watts, thus defeating the intention of the parties, giving to Watts $110,000 without any consideration, and withholding from Hawley the land for which he paid full value, and to which, therefore, he was fairly entitled.

Eliminating the description by metes and bounds, the descriptive part of the deed will read:

"All that certain tract, piece or parcel of land situate, lying and being in the Santa Rita Mountains in the Territory of Arizona, U. S. A., containing one hundred thousand acres be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part by deed dated on the 1st day of May, A. D. 1864 * * * The said tract of land being known as Location No. 3 of the Baca Series."

That the foregoing description is entirely sufficient to convey the land does not admit of any dispute, and concurring as it does with the obvious intention of the parties undoubtedly makes the deed executed by Watts to Hawley on January 8, 1870, a valid conveyance of this property.

The confusion in this case, and the resulting contention, arises out of the fact that in 1866 John S. Watts applied to the General Land Office for permission to amend the description of this land by changing the initial point, and his application was allowed. In accordance with this permission granted by the General Land Office, Watts made what is known as the amended location of 1866, which is described by metes and bounds as recited in the Hawley deed. The General Land Office permitted Watts to change the initial point upon the theory that he was merely making an amendment, and not attempting a substantial re-location of the Float. That view of the matter prevailed in the General Land Office until 1899, when a fuller presentation of the

question disclosed the fact that the change which Watts had made was, in effect, a new location, and therefore not authorized by the Act of June 21st, 1860, under which the heirs of Baca were permitted to select and locate certain lands.

With all the facts before him, the Secretary of the Interior decided—and we think it clear that the decision was a correct one—that the order made by the Commissioner of the General Land Office in 1866 allowing Watts to change the initial point was void, and that the claimants were remitted to the original location, as made in 1863. This decision of the Secretary of the Interior effaced the lines which Watts had attempted to establish in 1866 from the records of the United States and left the original location to stand as if the abortive attempt to change it in 1866 had never been made. There was not, therefore, in legal contemplation any amendment of the location of Baca Float No. 3 in 1866, and the action of the Interior Department in wiping out the lines which it had been attempted to establish, and remitting the claimants to the location of 1863, left, both in law and in equity, everything which had been done with respect to Baca Float No. 3 to relate to the location of 1863. To so hold simply means that Hawley obtained from Watts what Watts had obtained from the heirs of Baca; and to hold otherwise would mean that Watts obtained Hawley's money without rendering an equivalent for it.

Looking to the situation of the parties, and to the condition of the country at the time, it is perfectly plain that the real intention of Watts was to sell and the real inten-

tion of Hawley was to buy the land which Watts owned. Neither Watts nor Hawley had ever examined personally, or by his agents, the lands embraced either in the legal location of 1863 or the attempted location of 1866, and the essence of the transaction was the sale by the one and the purchase by the other of the land which Watts had acquired from the Baca heirs.

We have not gone into the questions raised by this point with as much detail and as many quotations from the authorities as might be possible, because the title of the plaintiffs depends upon their success in upholding the Hawley deed, and they have gone into the matter with a thoroughness and clearness which makes any extended discussion on our part too much of a repetition of their arguments.

THE PRENTICE CASES.

Counsel for Appellants rely upon the cases of Prentice vs. Stearns, 113 U. S. 435; and Prentice vs. Northern Pac. R. R. Co., 154 U. S. 163.

We confidently submit that a careful examination of these cases will disclose that they are not in anywise decisive of the question here before the court. In these cases the courts were unable to give effect to the maxim "Falsa demonstratio non nocet," for the reason that if the false description were disregarded no description of the land remained. Mr. Justice Mathews said in Prentice v. Stearns, supra, "The case is not one to which the maxim invoked for the construction of the deed can be applied. That rule of interpretation which rejects erroneous particulars of descriptions where what is left sufficiently identifies the subject of the grant, is adopted in aid of the intention of the grantor, as gathered from the instrument itself, read in the light of the circumstances in which it was written."

Mr. Justice Harlan, in Prentice v. Northern Pacific, supra, also held that the maxim could not be applied for the same reason. The deed there after first describing the land by metes and bounds, says: "And being the same land set off to the Indian Chief Buffalo," etc. The court held that these words were intended to describe generally what was first described specifically, and if otherwise sufficient could not be regarded as an independent description.

It is clear that there is a wide distinction between the Prentice deed and the Hawley deed. The Hawley deed has all of the elements which the Prentice deed lacked. By striking out the false description in the Hawley deed there remains a full and complete description of the land as it was finally surveyed. The grant in the Hawley deed is of the land "granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part by deed dated on the 1st day of May, 1864." Certainly, in any view of the case, this is a sufficient description to carry the title, for in the deed of May 1, 1864, to which reference is made, the land is described by the metes and bounds of the 1863 location. Instead of the general description being intended to describe the same land which the particular description gives, the particular description obviously is intended to describe more fully that land which has theretofore been granted by the general description, thus meeting the very criticism of the Supreme Court in the Prentice case.

Finally, we submit that no one can read the deed "in the light of the circumstances under which it was written," and have a doubt as to the intention of the grantor to convey Baca Float No. 3 wherever it should actually be ascertained to be upon the ground.

(a) The deed of May 30, 1871, from the heirs of Baca to John S. Watts inured to the benefit of Christopher E. Hawley.

On May 30, 1871, certain persons who covenanted

that they were all the heirs of Baca, made a deed to John S. Watts, whereby the said heirs ratified and confirmed the title made by them and by their "attorney, Tomas Cabeza de Baca, to John S. Watts, his heirs and assigns, on the 1st day of May, 1864, for the lands described in * * * Location Number three situate in Arizona Territory, containing 99,289.39 acres, the boundaries of which are set forth and described in said deed," and wherein and whereby the "said heirs of the said Luis Maria Baca, dec'd * * * relinquish and quit-claim to said John S. Watts, his heirs and assigns all their right, title and interest in all the lands in said deed of May 1st, 1864, mentioned and described."

The Santa Cruz Development Company and Joseph E. Wise contend that this deed did not inure to the benefit of Christopher E. Hawley, and in support of their contention they say that the Hawley deed was a quitclaim deed, and that, therefore, the after-acquired title of Watts did not pass to his grantee, Hawley, under that alleged quitclaim deed.

To this contention there are three answers. Each in itself is sufficient. They are, briefly stated.

(1) The title conveyed to John S. Watts by the deed of May 30th, 1871, passed to Hawley by Section 33, Chapter 42, Howell's Code of Arizona, 1864; because the Hawley deed purported to convey the land in controversy in fee simple absolute.

(2) The Hawley deed was not a quitclaim deed.

(3) Even though the Hawley deed was a quitclaim deed, there is now no difference in efficacy and operative force between a quitclaim deed and a deed of bargain and sale.

We will deal with these answers to their contention in the order in which they are stated.

(1) The contention that all the title to the land in controversy which passed from the heirs of Baca to John S. Watts by the deed of May 30th, 1871, did not inure to the benefit of Christopher E. Hawley is abundantly answered by a reference to Section 33, Chapter 42, Howell's Code of Arizona, 1864, which reads as follows:

> "If any person shall convey any real estate by conveyance purporting to convey the same in fee simple absolute, and shall not at the time of such conveyance have the legal estate in such real estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid as if such legal estate had been in the grantor at the time of the conveyance."

This provision was the law of Arizona at the time these two deeds were made.

In the case of Frink v. Darst, 14 Ill. (4th Peck) 304, 58 Am. Dec. 575, an Illinois Statute, almost identical in words with this statute, was under consideration by the court, and the court held that where the deed purported to convey the land itself, and not merely the grantor's

"right, title and interest" in the land, the statute would apply, and after-acquired title of the grantor would inure to his grantee. The deed under consideration in that case read "grant, sell and convey" * * * "all my right and interest in," etc. It will be seen that the word "quitclaim" nowhere appeared in this deed, the operative words of conveyance being "grant, sell and convey"; but the Supreme Court of Illinois held that the statute would not apply because the deed did not purport to convey the land itself, but only the "right, title and interest" of the grantor and was not, therefore, within the terms of the statute.

In Bogy v. Shoab, 13 Mo. 365, a provision in the Missouri statutes, almost identical with the provision quoted above, was construed by the Supreme Court of Missouri. That court reached a conclusion in exact accordance with our contention. The deed under consideration read "all right, title and interest," etc. of the grantor. The Court said that the statute did not apply to such a deed, because it was not a conveyance of the "fee simple absolute." The court then discussed the meaning of the words "fee simple absolute" and decided that they mean a conveyance of the land itself as distinguished from a conveyance of all the grantor's "right, title and interest" in the land. The Court held that the statute did not apply to the deed under consideration, because it only purported to convey the grantor's "right, title and interest." This case of Bogy v. Shoab, supra, was quoted with approval by the Supreme Court of Illinois in the case of Frink v. Darst, supra.

There is a similar provision in the statutes of South Dakota, and it was construed in the case of Tilton v. Flormann, 117 N. W. 377, the court holding in favor of the rule for which we contend.

(2) But independently of the provision of Howell's Code which we have discussed above, the title conveyed by the heirs of Baca to John S. Watts by their deed dated May 30, 1871, inured to the benefit of Christopher E. Hawley, because the Hawley deed was not a quitclaim deed.

The courts have held universally that where a deed conveys the land itself, and not merely the grantor's "right, title and interest" in the land, the deed is not a quitclaim, and that after-acquired title of the grantor will inure to the benefit of his grantee.

In Abernathy v. Stone, 81 Texas 430, a deed contained the words "have this day, do by these presents sell, alienate, convey and quitclaim unto said (grantee), his heirs and assigns forever, all and singular the following described tract of land (describing it), and containing 866 2-3 acres of land, and all right, title and interest which I have and devise to the above described tract of land by virtue of the survey aforesaid I sell, convey, and quitclaim to the said (grantee), from me and my heirs forever."

The Supreme Court of Texas says "the instrument was not, as we think, a quitclaim, but an absolute conveyance of the land itself as contradistinguished from a

transfer of the mere chance to or 'right, title and interest' in the land."

See also

Balch v. Arnold, 9 Wyoming 17, 59 Pac. 434.
Wightman v. Spofford, 56 Iowa 145, 8 N. W. 680.

Cummings v. Dearborn, 56 Vt. 441. (An excellent case, quoting from several others).

Garrett v. Christopher, 74 Tex. 453, 12 S. W. 67, 15 Am. St. Rep. 850.

Dycus v. Hart, 21 S. W. 229 (Texas).

Moore v. Swift, 67 S. W. 1065-1066 (Texas).

Kempner v. Beaumont Lumber Co., 49 S. W. 412 (Texas).

Prentice v. Duluth Storage & Forwarding Co., 58 Fed. 437.

Bennett v. Waller, 23 Ill. (13th Peck) 97, at page 184.

The courts have also held that if the operative words of a conveyance are "grant, bargain and sell," but the deed only purports to "grant, bargain and sell all the right, title and interest" of the grantor, the deed is a quit-claim.

Reynolds v. Shaver, 59 Ark. 209, 27 S. W. 78.

This case is interesting, and well illustrates our point, because it is the converse of it. The operative words of

the conveyance being "grant, bargain and sell" instead of "remise, release and quitclaim" as in the Hawley deed, and the instrument purporting to convey "all the right, title and interest" of the grantor, instead of the land itself, as is the case in the Hawley deed.

See also

Hilkowski v. McNellis, 107 N. W. 965, 98 Minn. 27.

In this case one of the parties agreed to convey land "by a good and sufficient quitclaim deed." The Supreme Court of Minnesota held that this agreement was sufficiently performed by a conveyance of all the grantor's "right, title and interest" in the land.

(3) The third answer to the contention of the Santa Cruz Development Company and Joseph E. Wise is found in the case of,

Moelle v. Sherwood, 148 U. S. 20.

In that case, the Supreme Court of the United States, speaking through Mr. Justice Field, say (page 29)

> "There is in this country no difference in their efficacy and operative force between conveyances in the form of release and quitclaim and those in the form of grant, bargain and sale."

A deed in the form of grant, bargain and sale is efficient and operative to convey an after-acquired title. If there be no difference in their efficacy and operative force between a deed of grant, bargain and sale and a

quitclaim, then a quitclaim deed must be efficient and operative to convey after-acquired title of the grantor. Therefore, even though the Hawley deed had been a quitclaim deed, under the decision in Moelle v. Sherwood, supra, after-acquired title of the grantor, Watts, would have inured to his grantee, Hawley.

This case was quoted and followed with approval by the United States Circuit Court of Appeals for the Eighth Circuit in

Rusk Land & Lumber Co. v. Wheeler, 189 Fed. 321.

(b) If the above propositions be true, then the deed of November 19, 1892, from John C. Robinson to Powhatan W. and James E. Bouldin was and is a valid and subsisting conveyance of the north half of the land in controversy.

At the trial in the court below the plaintiffs made no attack upon this deed in any way, and they did not appeal from the part of the decree which awarded these defendants their interest under this deed, and, therefore, if we concede that they obtained the title to the whole of the land in controversy by the Hawley deed, the confirmatory deed, and by mesne conveyances from Hawley to Robinson, then the deed from Robinson to James E. and Powhatan W. Bouldin is a good conveyance of the north half of the land here in controversy.

As we have just said, the plantiffs do not contend otherwise, and they are the only parties to this case who

have any interest whatever in that question, but we think it advisable for us to make some mention of the matter, because of the fact that at the trial in the court below the attorneys for the Santa Cruz Development Company and for Joseph E. Wise attempted to make an attack upon this deed on the ground that it was not a good conveyance of the north half of the land in controversy from Robinson to James E. and Powhatan W. Bouldin. We respectfully call the attention of the court to the fact that neither of these parties has any interest whatever in that question. Their title is adverse to the title which Robinson held, and is based upon the theory that the Hawley deed did not convey the land in controversy. They have nothing to do with the question of whether Robinson did or did not convey his title to James E. and Powhatan W. Bouldin, and upon what theory they think that they have a standing which permits them to make an attack upon that deed from Robinson to James E. and Powhatan W. Bouldin we are unable to imagine. The lower court at once overruled their contention, and we would not take up the time of the court with this matter, except that the attempt may be repeated in this court. We say again that the title of the Santa Cruz Development Company and of Joseph E. Wise is held in direct opposition to what is called the Robinson title, and that they have no interest of any nature whatever in the question of what Robinson conveyed to James E. and Powhatan W. Bouldin by his deed dated November 19th, 1892.

POINT NO. 3.

If the Hawley deed did not convey the title to the land in controversy, then the deed dated September 30, 1884, from the heirs of John S. Watts to David W. Bouldin was and is a valid and subsisting conveyance of the title to an undivided two-thirds interest therein.

This deed is a conveyance from the heirs of John S. Watts to David W. Bouldin of an undivided two-thirds interest in Baca Float No. 3, describing it by the original 1863 location. The deed is signed by John Watts for himself, and as attorney in fact, for the other heirs of John S. Watts. The defendant, Santa Cruz Development Company, raises several contentions with regard to this instrument. They contend first that John Watts did not have a proper power of attorney from the other heirs of John S. Watts to execute the deed. In John Watts's deposition, taken at Newton, Kansas, on October 27th, 1914, he stated specifically that he did have a power of attorney. (Rec., p. 285.) He further stated that in 1899, or some time prior thereto, James W. Vroom, President of the Santa Cruz Development Company, went through all of the papers in his possession regarding the Baca Float and took therefrom such as he wanted. He further testified (Rec., p. 295) that he turned those powers of attorney over to James W. Vroom, now President of the Santa Cruz Development Company.

The deed from the heirs of John S. Watts to David W. Bouldin was dated September 30, 1884, and is, there-

fore, an ancient instrument. Under the doctrine of ancient instruments proof of the power under which they were executed is not necessary. It will be presumed that the party executing them had the proper power of attorney.

Wigmore on Evidence—Vol. 3, Sect. 2144, and cases cited therein.

The Santa Cruz Development Company further contends that this instrument is not a conveyance, but an executory agreement. The rule is that the question as to whether any instrument is a conveyance or an executory agreement is one of intention to be determined from the instrument itself. If that intention be doubtful upon the face of the instrument, then surrounding circumstances may be looked to.

Williams v. Paine, 169 U. S. 55 (page 76).

Bortz v. Bortz, 48 Pa. St. 382.

We contend that this instrument on its face is plainly a conveyance. It begins with the words "This Indenture." The word "Indenture" applied to a written instrument imports in its broadest sense a conveyance.

Black's Law Dictionary, p. 616.

Whitney v. Richardson, 13 N. Y. Supp. 861, 862 (59 Han. 601).

Scott v. Mills, 10 N. Y. State Rep. 357-58.

So the parties start out by calling it a conveyance.

It contains words of present conveyance. The second paragraph of the deed reads as follows:

> "WITNESSETH, That the parties of the first part, for and in consideration of the sum of One Dollar to each and every one of them in hand paid, by the party of the second part, the receipt whereof is hereby by each and every one of them respectively acknowledged, and for the further consideration, covenants and agreements to be performed by the party of the second part, as hereinafter mentioned and for the purpose of compromising and settling the claims of title between the parties of the first and second part, and of perfecting and quieting the title to the lands hereinafter described, have granted, bargained and sold, and by these presents do grant, bargain, sell and convey unto the said party of the second part, and to his heirs and assigns forever, all the undivided two-thirds (2-3) of all our right, title and interest of, in and to the following described tracts or parcels of land, o wit:"

The instrument contains words of heirship.

The sixth paragraph of the instrument contains this sentence:

> "It being understood and agreed that this is a quit-claim title and that the parties of the first part are not to be responsible to the party of the second part for the failure of title or any part thereof."

It seems to us that this plainly indicates that the par-

ties intended this instrument to be a conveyance.

The instrument is signed by two subscribing witnesses. Under the laws of Arizona in force at that time, a conveyance to be valid had either to be acknowledged by the grantor, or signed or acknowledged in the presence of, at least, two credible subscribing witnesses.

Furthermore, the parties to the instrument have settled all possible question as to what it is by calling it a conveyance in the body of the instrument. In the second sentence of page 277 of the record appear the words:

> "And the said David W. Bouldin, party of the second part, hereby covenants and agrees with the parties of the first part, in further consideration of this **conveyance** that he will," etc.

(a) If the above proposition be true, then the title which was conveyed by that instrument to David W. Bouldin is now vested in these defendants.

On March 13th, 1893, Ireland and King brought a suit against David W. Bouldin, in the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima, on a note for $5,000. In their declaration (Rec., p. 456) filed on that day they set out that note in full. On the same day they sued out a writ of attachment (Rec., p. 465) addressed to the sheriff or any constable of the County of Pima and signed by the clerk of the above court, commanding the sheriff or constable to attach sufficient property of David W. Boul-

din which might be found in Pima County to make the sum of $5,000 with interest. This writ of attachment was levied upon all the interest which David W. Bouldin had on March 14, 1893, in and to the land in controversy.

In May, 1893, David W. Bouldin answered that suit (Rec., p. 466) setting up the title bond described in the note sued on, and contending that he was not liable on the note because Ireland and King could not convey to him a good title to the two-twenty-sevenths interest.

In December, 1893, David W. Bouldin died, and sometime thereafter Leo Goldschmdt was appointed by the court at Tucson as administrator of the estate of David W. Bouldin (Rec., p. 505) and was substituted as defendant in the case. (Rec., p. 498).

On the 2nd day of May, 1895, the court gave judgment (Rec., p. 468) against Leo Goldschmidt, as administrator of the estate of David W. Bouldin, for the sum of $8,550.00, with interest and costs, and ordered "that said amount be paid by said Leo Goldschmidt, administrator, in the due course of the administration of the estate of David W. Bouldin, deceased." The judgment of the court then continued as follows:

> "And it further appearing to the court that said attachment lien should be foreclosed, and that all of said property, or a sufficiency thereof, should be sold to satisfy said judgment;

Now, Therefore, it is ordered, decreed and adjudged that the said attachment lien as the same existed on the 14th day of March, 1893, be and the same is hereby foreclosed, and that an order of sale be issued by the Clerk of this Court, under the seal of this Court, directed to the Sheriff of the County of Pima, Territory of Arizona, directing him to sieze and sell as under execution, for the purpose of foreclosing the said attachment lien, the right, title and interest of said David W. Bouldin in the above described property, as the same existed on the 14th day of March, 1893, or so much thereof as will be necessary to satisfy the said judgment with costs and costs of said sale.

Done in open court this 2nd day of May, 1895.

J. D. BETHUNE,

Judge."

We deny that the court had power to render the judgment that it did render. We claim that that portion of the judgment foreclosing the attachment and directing a sale of the property was wholly without the court's jurisdiction and therefore, as we shall hereafter point out, open to collateral attack.

In considering the question of the jurisdiction of the court we shall first examine the statutes of the Territory of Arizona in force at that time, to wit, Pars. 797, 799, 1117, 1119, 1121 and 176, Revised Statutes of 1887, which are as follows:

Par. 797. (Sec 149) Judgments for the foreclosure of mortgages and other liens shall be that the plaintiff recover his debt, damages and costs, with a foreclosure of the plaintiff's lien on the property subject thereto, and (except in judgments against executors, administrators and guardians) that an order of sale shall issue to the sheriff or any constable of the county where such property may be, directing him to seize and sell the same as under execution, in satisfaction of the judgment; and if the property cannot be found, or if the proceeds of such sale be insufficient to satisfy the judgment, then to make the money, or any balance thereof remaining unpaid, out of any other property of the defendant, as in case of ordinary executions.

Par. 799. (Sec. 151) When a recovery of money is had against an executor, administrator or guardian, as such, the judgment shall state that it is to be paid in the due course of administration, and no execution shall issue. Such judgment shall not be a lien on the real property of a decedent.

Par. 1117. (Sec. 153) No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case: an action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse

against any other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action unless such claim be so presented.

Par. 1119. (Sec. 155) If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentations required.

Par. 1121. (Sec 157) A judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the probate judge, and the judgment must be, that the executor or administrator pay in due course of administration the amount ascertained to be due. A certified transcript of the judgment must be filed in the probate court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate or give to the judgment creditor any priority of payment.

Par. 1176. (Sec 212) When any sale is made by an executor or administrator, pursuant to the provisions of this chapter, of lands subject to any mortgage or other lien, which is a valid claim

against the estate of the decedent, and has been presented and allowed, the purchase money must be applied, after paying the necessary expenses of the sale, first to the payment and satisfaction of the mortgage or lien, and the residue, if any, in due course of administration. The application of the purchase money to the satisfaction of the mortgage or lien must be made without delay, and the land is subject to such mortgage or lien, until the purchase money has been actually so applied. No claim against any estate which has been presented and allowed, is affected by the statute of limitations pending the proceedings for the settlement of the estate. The purchase money, or so much thereof as may be sufficient to pay such mortgage or lien, with interest, and any lawful costs and charges thereon, may be paid into the probate court, to be received by the clerk thereof, whereupon the mortgage or lien upon the land must cease, and the purchase money must be paid over by the clerk of the Court without delay, in payment of the expenses of the sale, and in satisfaction of the debt to secure which the mortgage or other lien was taken, and the surplus, if any, at once returned to the executor or administrator, unless for good cause shown, after notice to the executor or administrator, the court otherwise directs.

It will be observed that Par. 797, which contains the general provisions as to judgments for the foreclosure of mortgages or other liens, expressly excepts judgments

against executors, administrators and guardians, and that Par. 799 provides as to them: "the judgment shall state that it is to be paid in he due course of administration."

Par. 1117 prohibits maintaining any action upon a claim against an estate unless the claim is first presented to the executor or administrator, except that the holder of a mortgage or lien may maintain an action to enforce the same against the property of the estate subject thereto where all recourse against any other property of the estate is expressly waived in the complaint.

These provisions of the Statutes of 1887 were considered by the Supreme Court of Arizona in Wartman v. Pecka, 8 Ariz. 8, 68 Pac. 534.

In that case suit was brought upon a promissory note and on the same day an attachment was sued out and levied on real estate of the defendant. Thereafter the defendant died and an administrator was appointed. The plaintiff presented his claim to the administrator and it was rejected. The administrator was made a party to the suit and an amended complaint was filed but no waiver of recourse against other property of the estate was made in the amended complaint. A personal judgment was rendered, the trial court, however, holding that the attachment was dissolved by the death of the defendant.

The Supreme Court held that the death of the defendant did not dissolve the attachment but that there being

no waiver of recourse in the amended complaint plaintiff was not entitled to have the property sold under his judgment. It was held that the provisions of Par. 1117 embraced an action pending against a decedent at the time of his death, and that if the plaintiff in such action should amend his complaint waiving all recourse against any other property of the estate he could secure a foreclosure of his lien and have the property sold to satisfy it.

The court said:

> "If section 1117 is to be construed as embracing an action pending against the decedent at the time of his death it follows that before the plaintiff in any such action may enforce an attachment lien he must comply with the requirement as to an express waiver of all recourse against any other property of the estate. This he may do, if he so elects, by amending his complaint in that behalf. Should, however, the plaintiff present his claim to the executor or administrator for allowance or rejection, and make no waiver as required in Par. 1117, then we think there is still ample provision in other sections of the Probate Act, which save to him his attachment lien, to be enforced in due process of administration."

The court then quotes Par. 1176 of the Statutes, and orders that judgment be entered establishing the attachment lien on the real estate and directing that the judgment be paid in due course of administration of the es-

tate, and that the real estate attached shall be subject to the attachment lien until paid and satisfied out of the general funds of the estate, and if said general funds be insufficient, then out of the proceeds of sale of the real estate in the order of the priority of said lien.

The facts in this case come squarely within the decision of the Supreme Court of Arizona in the Wartman case. The facts are precisely the same except that in the Wartman case the plaintiff did file an amended complaint, while in this the plaintiff filed none. Both presented claims to the administrator; neither waived re course. Therefore the decision in the Wartman case is conclusive here.

The only jurisdiction then that the court had in this case was to render judgment against Goldschmidt as Administrator and to order the judgment paid in due course of administration, directing that the attachment lien be satisfied by payment from the general funds of the estate, or, if they be insufficient, to direct the administrator to sell the real estate attached to satisfy the lien of the attachment.

The judgment undertakes to direct that it be paid in due course of administration, and that the lien be foreclosed and the property sold. It is clear that the court had no jurisdiction to do both. The only manner in which the court could have acquired jurisdiction that would have enabled it to render a judgment directing the property to be sold was by the plaintiff filing an amended complaint in which he waived recourse to other prop-

erty. As no such amendment was filed, the order that the property be sold was wholly beyond the jurisdiction of the court.

It has been uniformly held that the construction of a state statute by the state court is binding on the Federal courts, and therefore this court is bound by the construction given to these statutes by the Supreme Court of Arizona in the case of Wartman vs. Pecka, supra. Under the authority of that case the judgment of the District Court of Pima County in the case of Ireland and King vs. Bouldin was beyond the jurisdiction of the court and therefore void.

The attorney for Joseph E. Wise contends that this judgment is safe from collateral attack, because he says that the court had jurisdiction of the parties and of the subject matter, and that therefore the judgment is safe from collateral attack. But conceding for the moment that the court did have jurisdiction of the parties and the subject matter, that is not all that is necessary to render the judgment safe from collateral attack. Judge Gilbert of this court, in Cohen vs. Portland Lodge No. 142, B. P. O. E., 140 Fed. 774, said:

> "A domestic judgment is conclusive against collateral attack only when the jurisdictional facts appear of record or when the court has expressly adjudged that they exist."

In Ritchey vs. Sayers, 100 Fed. 522, it is said:

> "But it may be claimed in this case that the court

had a full and complete jurisdiction of the case that may be conceded, but the question is, 'did it have jurisdiction to enter the particular decree or judgment thereon that it did enter?' As we have before seen, we reached the conclusion that the particular judgment could not be entered; and it is a well-settled principle that although a court may have jurisdiction of a case, yet if it appears on the record that it did not have jurisdiction to enter the decree and the particular judgment thereon that it did enter, then that decree and judgment may be collaterally impeached."

The Supreme Court of the United States has in several cases announced the doctrine that a court must have jurisdiction to enter the particular judgment that it did enter in order to render it invulnerable to collateral attack. These cases are reviewed and quoted from in Russell vs. Shurtleff, (Colorado) 65 Pac. 27. In that case the judgment under review was rendered in an action in which the prayer of the complaint was for a several judgment in proportion to the respective interests of the defendants in certain mining properties. The judgment rendered was joint, for the entire sum. The Supreme Court said that this was error and that the question was whether it rendered the judgment void or merely voidable.

The subject is discussed as follows:

"One of the essentials of a valid judgment is that the court pronouncing it must have jurisdiction to

render that particular judgment (Newman v. Bullock, 23 Colo. 217,, 47 Pac. 379; 12 Am. & Eng. Enc. Law, 1st Ed., 246); and, if it appears from the record of a judgment that the court in pronouncing it acted without jurisdiction, it is void (People v. District Court, 22 Colo. 422, 45 Pac. 402; Brown v. Wilson, 21 Colo. 309, 40 Pac. 688, 52 Am. St. Rep. 228; Great West. Min. Co. v. Woodmas of Alston Min. Co., 14 Colo. 90,, 23 Pac. 908). The distinction between void and voidable judgments is often refined, and difficult of solution. 'A judgment may be erroneous, and not void, and it may be erroneous because it is void.' Ex part Lange, 18 Wall 163, 21 L. Ed. 812, supra. There can be no doubt as stated in Newman v. Bullock, 'that the tendency of the later authorities, especially in the federal courts, is to enlarge the definition of jurisdiction to make it include not only the power to hear and determine, but also the power to render the particular judgment in the particular case.' This doctrine is based upon the proposition that, if a court is not invested with power to render a particular judgment, its attempt to do so is without its jurisdiction, and must not be confounded with the proposition that the rendition of an erroneous judgment within its power is but the erroneous exercise of its jurisdiction. With full jurisdiction to pronounce a judgment which would be binding upon the defendants and their property, the power and authority of the county court was

limited by definite, statutory provisions as to the character of relief which could be granted against defendants who had not answered. By directing a joint judgment when an individual one only was prayed for, the trial court transcended its authority and violated express statutory commands, for, although its jurisdiction attached to the parties a judgment not within the powers granted by the law of its organization is void. Ex parte Lange Supra; U. S. v. Walker, 109 U. S. 258, 3 Sup. Ct. 277, 27L. Ed. 927. U. S. v. Walker was an action by an administrator de bonis non on the bond of an administratrix to recover money received for assets of the estate collected by the latter and which by order of the court, in the settlement of her account as administratrix, she was directed to pay over to the administrator de bonis non. The law of the jurisdiction under which the administratrix acted provided that upon the removal of an administrator the court shall have authority to direct that assets of the deceased in his hands, which may remain unadministered, be delivered to the newly appointed administrator. The court concluded that this statute did not change the common-law rule to the effect that an administrator de bonis non derives his title from the deceased, and not from the former administrator; that to him is committed only the administration of the assets of the deceased which have not been administered; and, therefore, assets of the estate which

had been converted into money by the former administrator were funds to which he was not entitled. It was urged that the decree directing the administratrix to pay over these funds to her successor was conclusive in the suit upon her bond, for the reason that such decree could not be collaterally attacked. The supreme court held to the contrary, because, as stated, in effect, the court directing the decree exceded its jurisdiction, in that its authority for making the order was limited to assets of the decedent in the hands of the administrator which were not administered upon. Bigelow v. Forrest, 9 Wall, 339, 19 L. Ed. 696, was an action of ejectment. Bigelow, who was defendant in the trial court, relied for title on a sale made under a decree of the United States District Court rendered in a proceeding for the confiscation of the premises sued for under the Act of July 17, 1862. This Act provided that the property of an officer of the army or navy of the Confederate government might be seized and sold, which proceedings should operate to divest the owner of the property so seized of any interest therein during his life. Under this Act a decree had been rendered which purported to direct a sale of the property in fee. The heir of the owner claimed that the decree was void in so far as it purported to direct an unconditional confiscation of the property in question. In the action of ejectment it was contended that this question could not be raised collaterally. The Supreme Court said: 'Doubtless, a

decree of a court having jurisdiction to make the decree cannot be impeached collaterally, but under the Act of Congress the district court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest:' and the court therefore held that so much of the decree of the court in which the confiscation proceedings were had as was in excess of its powers was void. Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914, is also a case where the question as to when a judgment may be collaterally attacked is considered. In that case it was said: 'The doctrine invoked by counsel that, where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition; but, like all general propositions, is subject to many qualifications in its application. * * * Though the court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its modes of judgments. It must act judicially in all things and cannot then transcend the power conferred by law * * * The doctrine stated by counsel is only correct when the court proceeds after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it.' "

See also:

Noble v. Union River Logging R. Co. 147 U. S. 165

Sache v. Wallace, (Minn.) 112 N. W. 386.

Venner v. Denver Union Water Co., 63 Pac. 1061.

Jorgenson Co. v. Rapp, 157 Fed. 732.

Walkins Land Co. v. Mullen, 54 Pac. 923.

23 Cyc. 684, and cases cited.

12 Am. & Eng. Enc., 1st Ed., 246.

There would seem to be no question whatever under the statutes as construed by the Supreme Court of the State of Arizona, but that a waiver of recourse against other property of the estate is jurisdictional; that without such waiver the court has no power to order the sale of property of the estate by the sheriff, and that in this case the court had no power or jurisdiction to enter the particular judgment that it did render. And it seems equally clear from the authorities we have cited that the judgment ordering the sheriff to sell the property is void and open to collateral attack.

But there is a further reason why we may attack that judgment collaterally, and this same reason applies to all the proceedings in that suit. Wilbur H. King, the plaintiff in that case, was the purchaser at the Sheriff's sale, and Joseph E. Wise, who now claims title through that sale, holds by a quitclaim deed from King. The rule is

universal that where the judgment creditor purchases at a sheriff's sale, he is not a bona fide purchaser for value

In Branck v. Foust, 30 N. E. 631, 130 Ind. 538, the court says:

> "While we feel we are not required to decide the question here, we do not wish to be understood as affirming or intimating that a sheriff's sale may not be attacked collaterally, where, as in the case at bar, the purchaser is the execution plaintiff. The authorities are uniform in holding that he is chargeable with notice of all irregularities in the sale."

Citing.

Meredith v. Chancey ,59 Ind. 466-469.

Harrison v. Doe, 2 Blackford 1.

Hamilton v. Burch, 28 Ind. 233-235.

Piel v. Brayer, 30 Ind. 332-339.

Keen v. Preston, 24 Ind. 395-398.

Carnahan v. Yorkes, 87 Ind. 62.

Richey v. Merritt, 108 Ind. 347, 9 N. E. 368.

See also

Lightfoot v. Horst, 122 S. W. 606 (Texas 1909).

Henderson v. Rushing, 105 S. W. 840.

American Savings Bank & Trust Co. v. Helgesen, 122 Pac. 27 (Wash.)

The same rule applies to the assignee of an execution plaintiff.

Spears v. Weddington, 142 S. W. 679 (Ky.)

Richey v. Merritt, 9 N. E. 368, 108 Ind. 347.

The reason for this rule is plain. The execution plaintiff has actual notice of all the proceedings in the case. He is interested in it from the start and is familiar with all the procedings. Furthermore, he pays no real consideration; he merely credits the amount of his bid on his judgment. He is not a purchaser for value.

Under that judgment of the District Court of Pima County, R. N. Leatherwood, sheriff of Pima County, on July 8th, 1895, published a Notice of Sale. (Record, page 474.) This Notice of Sale reads as follows:

"NOTICE OF SHERIFF'S SALE.

John Ireland and Wilbur H. King,
Plaintiffs,

—vs—

Leo Goldschmidt, Administrator
of the Estate of David W. Bouldin,
deceased,
Defendant.

Under and by virtue of an execution and order of sale issued out of the District Court of the First

Judicial District of the Territory of Arizona, in and for the County of Pima, on the 3rd day of July, A. D. 1895, and to me as Sheriff duly directed and delivered, on a judgment rendered in said court, in the above entitled action, on the 2d day of May, A. D. 1895, for the sum of eight thousand five hundred and eighty-four dollars and forty-five cents ($8584.45) with interest thereon at the rate of ten per cent per annum until paid, together with the foreclosure of plaintiff's attachment lien upon the following described property in Pima County, Territory of Arizona,upon which I have duly seized and levied and in said order of sale described as Location Number Three, being one of five tracts of land selected and located by virtue of and in accordance with the provisions of the 6th Section of an Act of Congress of the United States, approved June 21st. 1860, entitled "An act to confirm certain Private Land Claims in New Mexico," and found in volume twelve, page 72, of the United States Statutes at Large, said location being described as follows: Situated in the Territory of Arizona, formerly Dona Ana county, New Mexico, beginning at a point one mile and one-half from the Salero Mountain, in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point, west twelve miles, thirty-six chains and thirty-four links; thence south twelve miles, thirty-six chains and thirty-four links, thence east twelve miles, thirty-six chains and thirty-four

links; thence north twelve miles, thirty-six chains and thirty-four links to the place of beginning, and containing ninety-nine thousand two hundred and eighty-nine acres and 39-100 of an acre, more or less; as said attachment lien existed on the 14th day of March, A. D. 1893.

Public notice is hereby given that I will at the court house door of the said County of Pima, at the hour of ten o'clock a. m., on Wednesday, the 31st day of July, A. D. 1895, sell at public auction to the highest and best bidder for cash, in lawful money of the United States, all the right, title, claim and interest both legal and equitable of the above named defendant in, of and to the above described property and all the right, title and interest both legal and equitable which said David W. Bouldin, deceased, had at the time of his death, in, of and to the above described property, or so much of said property as may be necessary to satisfy said judgment and costs of suit and all accruing costs.

Dated July 8, 1895.

R. N. LEATHERWOOD,
Sheriff."

It will at once be seen that this Notice of Sale does not conform to the judgment of the court. It gives notice that on July 31st, 1895, the sheriff of Pima County will sell to the highest bidder, for cash, the interest of "the above named defendant" and the interest which David W. Bouldin, deceased, had at the time of his death. "The

above named defendant" referred to in the notice was Leo Goldschmidt, administrator of the estate of David W. Bouldin.

There is no notice given that the sheriff will sell the interest which had been attached on March 14th, 1893, wnich was the interest he was ordered to sell by the judgment of the court.

The next step in the proceedings was the sheriff's Certificate of Sale (Rec., p. 513). This certificate reads as follows:

"Office of the Sheriff,

County of Pima, ss:

I hereby certify that I received the annexed Order of Sale at 5:30 P. M. on the 3rd day of July, 1895. And under and by virtue of said Order of Sale, I did on the 5th day of July, 1895, levy upon all the right, title, claim and interest of the within named defendant, Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased, in and to the following described real property lying, being and situate in the County of Pima, Arizona Territory, to wit: Location number three (3) being one of five tracts of land selected and located by virtue of and in accordance with the provisions of the sixth section of an Act of Congress of the United States approved June 21st, 1860, entitled, "An act to confirm certain private land claims in New Mexico,"

and found in volume Twelve, page 72, of the United States Statute at Large, said location being described as follows: Situated in the Territory of Arizona, formerly Dona Ana County, New Merico, beginning at a point one mile and a half from the Salero Mountain in a direction north forty-five degres east of the highest point of said mountain, run ning thence from beginning point west twelve miles thirty-six chains and thirty-four links, thence south twelve miles thirty-six chains and thirty-four links, thence east twelve miles thirty-six chains and thirty-four links, thence east twelve miles thirty-six chains and thirty-four links, thence north twelve miles thirty-six chains and thirty-four links to the place of beginning, containing ninety-nine thousand and two hundred and eighty-nine acres and thirty-nine hundredths of an acre, more or less.

And I further certify that under and by virtue of said Order of Sale, I did advertise said real property for sale by posting notices of said sale in three public places, one of which was at the court house door.

And also by advertising in the "Citizen," a daily newspaper of general circulation published in the City of Tucson, Pima County, Arizona Territory, a copy of which is hereto attached, from the 8th day of July, 1895, until the 31st day of July, 1895, daily and successively. And I further certify that I did attend at the hour, time and place advertised for said sale and offered for sale a part of said property

for sale and received no bid. I then offered two parts of said property for sale and received no bid. I then offered three parts of said property for sale and received no bid, then I offered the whole of said property for sale and received a bid of two thousand dollars ($2,000), that being the highest and best bid offered in lawful money of the United States, the said property was sold to Wilbur H. King.

R. N. LEATHERWOOD,
By W. H. Tyler, D. S." Sheriff.

The "said property" mentioned in this Certificate of Sale was "all the right, title, claim and interest of the within named defendant, Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased" in and to the land in controversy in the case at bar. This Certificate of Sale is the only evidence which we have of what was actually sold, and it shows that the sheriff sold the interest of Leo Goldschmidt, administrator of the estate of David W. Bouldin, and not the interest which he had been ordered to sell, namely: the interest attached on March 14th, 1893.

A sheriff, in making a sale of land is acting under a purely statutory authority, and all his acts in making the sale must be strictly in compliance with the order of the court and the requirements of the statute, or they will be void and of no effect. The sheriff of Pima County was ordered to sell all the interest which David W. Bouldin had in the land in controversy on March 14th,

1893. He sold the interest which Leo Goldschmidt, administrator, of the estate of David W. Bouldin, had on July 31st, 1895, and therefore, since he acted entirely wtihout authority in making the sale which he did make, the sale was void and passed no title whatever to the purchaser.

No redemption was made from this sale and on January 16th, 1899, Lyman W. Wakefield, sheriff of Pima County, executed and delivered a deed (Rec., p. 515) to Wilbur H. King, the purchaser at the sheriff's sale. This deed attempts to recite the previous proceedings in the case; but it recites them incorrectly from beginning to end, even to the time of day at which the sale was made. The granting part of this deed reads as follows:

> "has granted, bargained, sold and conveyed and confirmed and by these presents does grant, bargain, sell, convey and confirm unto Wilbur H. King, one of the said parties of the second part, and his heirs and assigns forever all the right, title, interest and claim which the said judgment debtor Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased, had on the said thirty-first day of July, 1895, or at any time afterwards or now have in and to all that certain lot, piece or parcel of land situated, lying and being in the said County of Pima, Territory of Arizona, and bounded and particularly decribed as follows, to-wit:"

then follows a description of the land in controversy in the case at bar.

It will be seen that this deed only purports to convey the interest "which the said judgment debtor, Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased, had on the 31st day of July 1895, or at any time afterwards" in and to the land in controversy. This deed was absolutely void and carried no title whatever to Wilbur H. King for the same reasons given in connection with the Certificate of Sheriff's Sale. It did not convey the attached interest which the court had ordered sold. And the attached interest was the only interest which the sheriff of Pima County had any authority to sell or convey.

Whiting vs. Hadley, 85 Mass. (3 Allen) 357.

"The deed and its recitals not being in accordance with the levy and actual sale on the execution, no legal title was vested in the purchaser."

Bailey vs. Block, (Tex.) 134 S. W. 323,

Ware vs. Johnson, 66 Mo. 662,

Landreaux vs. Foley, 13 La. Ann. 114,

Waters vs. Duvall, 11 Gill & Johnson, 37, 33 Am. Dec. 693.

On April 24th, 1907, Wilbur H. King conveyed by quitclaim deed all his interest in the land in controversy in the case at bar to Joseph E. Wise.

The case now before the court was commenced by the filing of the plaintiff's bill in the United States District Court at Tucson, Arizona, on June 23rd, 1914. In due time thereafter, Joseph E. Wise filed an answer to that bill, claiming title to a large interest in the land under the sheriff's sale which we have described above.

After filing his answer in the case doubt seems to have arisen in his mind as to the validity of the sheriff's deed to Wilbur H. King, and as a matter of fact counsel for Joseph E. Wise practically concedes in his brief that the deed was invalid and carried no title, by making no attempt whatever to sustain it and relying entirely upon his subsequent deed.

On September 30th, 1914, the attorney for Joseph E. Wise appeared in the Superior Court of Pima County and obtained the order of that court which appears in the record at page 489. We do not deem extended comment necessary upon that proceeding. It was done purely ex parte and without notice, actual or constructive, to Leo Goldschmidt, administrator of David W. Bouldin, or the Bouldin defendants, though their Tucson attorney had an office almost adjoining the office of the attorney for Joseph E. Wise.

A sheriff's deed cannot be made in this fashion fifteen years after the delivery of the original deed without notice to the parties interested.

Blodgett vs. Perry, 97 Mo. 263, 10 S. W. 89.

A reading of this case we think will satisfy the court on this point.

Furthermore, the Revised Statutes of Arizona, 1901, provided that no judgment could be enforced or carried into effect after a lapse of five years from the rendition thereof without a hearing and notice to the parties interested.

Paragraph 2562 reads as follows:

> "The judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by application to and leave of the court, and upon a hearing had thereof, notice being given thereon to the parties interested in manner as may be directed by the court or judge at the time of application."

This action of Joseph E. Wise in 1914 was, of course, an attempt to enforce the judgment of the District Court of Pima County rendered on May 2nd, 1895, and since the attempt to enforce that judgment was made almost nineteen years after the judgment was rendered, notice and hearing were undoubtedly required by that paragraph of the statute.

The deed dated October 5, 1914, from the sheriff of Pima County was void for the further reason that the sheriff of Pima County has no power to convey land beyond the limits of Pima County.

Hanby vs. Tucker, 23 Ga., 132.

At the time of this conveyance in 1914, the land in controversy was located in Santa Cruz County.

There are many other minor points in connection with this Ireland and King's sheriff's sale which we might discuss, and there are other objections to it which we think might be sustained. For instance, all the proceedings are against Leo Goldschmidt, administrator of the estate of David W. Bouldin, and not against Leo Goldschmidt, **as** administrator. The words, "administrator of the estate of David W. Bouldin" are merely descriptio personae and do not imply that the proceedings were against him in his official capacity as administrator. But we think we have sufficiently demonstrated the entire invalidity of all these proceedings, and we will not extend this discussion further.

David W. Bouldin died intestate in December, 1893, leaving as his only heirs at law his two sons, James E., and P. W. Bouldin, who inherited his estate share and share alike. The interest which they obtained as the heirs of David W. Bouldin is now vested in these defendants. James E. Bouldin has since conveyed his interest to Jennie N. Bouldin, by deed, (Record, page 431), duly acknowledged and recorded. P. W. Bouldin has also conveyed his interest to the defendants, David W. Bouldin, Jr., and Helen L. Bouldin. This latter deed is not in the record. We did not introduce it in evidence because the lower court had already ruled on the Hawley deed and the confirmatory deed when we put in our case, and therefore our entire chain of title under the deed dated September 30th, 1884, from the heirs of John S. Watts to David W. Bouldin had become immaterial.

In the event, however, that this court reaches the conclusion that this sheriff's sale which we have discussed, did convey some title to the land in controversy to Wilbur H. King, and from him to Joseph E. Wise, then we respectfully ask this court to reverse and remand this case for further proceedings.

As we have said before, the trial court ruled on the effect of the Hawley deed and the confirmatory deed during the trial of the case and we did not put in our evidence under the chain of title which begins with the deed from the heirs of John S. Watts to David W. Bouldin on September 30th, 1884. The rule in Arizona is that a purchaser at a sheriff's sale takes the property purchased subject to all outstanding equities and trusts of which he had knowledge at the time he purchased.

Luke vs. Smith, 13 Ariz., 155, 108 Pac. 494.

We have evidence in our possession which we think shows conclusively that Wilbur H. King had knowledge of a trust in this property in favor of these defendants at the time he purchased the property, but owing to the action of the court in ruling at the trial on the effect of the Hawley deed and the confirmatory deed all our evidence under the chain of title which we are now discussing became immaterial, and we did not introduce it.

(4) If the deed of May 30, 1871, from the heirs of Luis Maria Baca to John S. Watts did not inure to the benefit of Christopher E. Hawley, then the deed of September 30, 1884, from the heirs of John S. Watts to

David W. Bouldin was and is a valid and subsisting conveyance of an undivided two-thirds of all the interest in the land in controversy which was conveyed to John S. Watts by the heirs of Luis Maria Baca on May 30, 1871.

A discussion of this point only becomes of importance in the event that the court decides that the Hawley deed conveyed the property in controversy and then decides that the confirmatory deed did not inure to the benefit of Hawley. In that event, these defendants claim that an undivided two-thirds of whatever title passed to Watts by the confirmatory deed is now vested in them by virtue of the deed of September 30, 1884, from the heirs of John S. Watts to David W. Bouldin. The argument in connection with that deed of September 30, 1884, and in connection with the Ireland-King Sheriff's sale, has been set out in extenso elsewhere in this brief and will not be repeated here.

(5) No claim under adverse possession to any part of the land in controversy could be initiated prior to December 14, 1914.

Until the land in controversy was segregated from the public domain no rights by adverse possession could be initiated against the Grant claimants, Wilson Cypress Company vs. Del Pozo y Marcos, 236 U. S., 635. Crittenden Cattle Company vs. Ainsa, 14 Ariz. 306, 127 Pac. 733.

The decree of the Supreme Court of the United States in the case of Lane v. Watts ordered, among other things,

"that the defendants Franklin K. Lane, Secretary of the Interior, and Frederick Dennett, Commissioner of the General Land Office, and each of them and their successors in office, and all persons claiming to act under the authority or control of either of them be, and they are hereby required forthwith to place on file as muniment of the title which passed to the heirs of said Baca aforesaid, and for future reference as required by law, the field notes and plat of survey, made by Philip Contzen, under contract No. 136, dated June 17, 1905, for the purpose of defining the outboundaries of said land and segregating the same from the public lands of the United States." (Rec., p. 410).

This survey was filed pursuant to the mandate of the Supreme Court of the United States on December 14th, 1914, and the land then became segregated from the public domain.

Respectfully submitted,

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WELDON M. BAILEY,
Attorneys for Defendants and Appellees Bouldin.